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JAMES R. BROWNIN

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 484

WESTINGHOUSE BROADCASTING COMPANY, INC., *Appellant*,

vs.

UNITED STATES OF AMERICA, RADIO CORPORATION OF AMERICA and NATIONAL BROADCASTING COMPANY, INC., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

GEORGE B. TURNER
15 Broad Street
New York 5, N. Y.

PHILIP H. STRUBING
123 South Broad Street
Philadelphia 9, Pennsylvania
Attorneys for Appellant

CRAVATH, SWAINE & MOORE,
15 Broad Street,
New York 5, N. Y.

PEPPER, HAMILTON & SCHEETZ,
123 South Broad Street,
Philadelphia 9, Pennsylvania.
Of Counsel.

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STATEMENT

Pursuant to Rule 16(3) of the Rules of this Court, appellant submits this Brief in opposition to the motions to dismiss or affirm which have been filed by appellees. The statement of the case is set forth at pages 4 through 8 of the Jurisdictional Statement. The Jurisdictional Statement also sets forth the questions presented and the bases upon which appellant maintains that the questions are substantial.

This brief will be limited to answering points raised by appellees' motions.

ARGUMENT

The Westinghouse appeal presents three substantial questions. One of those, the question whether the District Court abused its discretion by holding that opposition by the Department of Justice required it to refuse to exercise its discretion to permit intervention by Westinghouse, is of great significance. An affirmance (or dismissal) by this Court will mean that the Department of Justice can always control the discretion of the District Court.

(a) Question of whether Government's opposition should have controlled the Court

Appellees contend that the District Court's denial of intervention was not based "'merely' on grounds that 'since plaintiff opposed intervention * * * the Court would not as a matter of law exercise its discretion to permit intervention'" (U. S. 9), and that "The court below did not decline to exercise its discretion 'as a matter of law'" (RCA 12).* Those contentions are contrary to the plain language of the opinion that the District Court's denial of permissive intervention was based solely on the ground that intervention should not be allowed "over the objection of the authorized agency".

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*RCA and NBC also maintain, at pages 12-3 of their Brief, that Westinghouse cannot even invoke Rule 24(b). But, in *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, 141, this Court, in a similar situation, held

> "The appellant had standing to invoke the discretion of the District Judge to permit it to intervene under [Rule 24] (b)(2) on the ground that its 'claim or defense and the main action have a question of law or fact in common'".

The District Court denied intervention on two grounds:

(1) That "this Court has no jurisdiction to allow the intervention sought" in view of the provision of the Judgment that jurisdiction was retained for the purpose of enabling the parties thereto, "and no one else", to apply to the Court.

(2) That intervention should not be allowed over the objection of the Department of Justice because

> "It would not lead to an orderly administration of justice to allow intervention in this type of anti-trust litigation over the objection of the authorized agency of the United States in charge of enforcing a decree which it has obtained."

The clear question presented by the Westinghouse appeal, in so far as it concerns permissive intervention, is whether, as a matter of law, a District Court should refuse to permit a third party to intervene in an attempt to demonstrate to the Court that its judgment is being violated solely because of "the objection of the authorized agency of the United States in charge of enforcing a decree which it has obtained."

It is undoubtedly proper that in some circumstances intervention should be denied where the Department of Justice has objected. It is clear, however, that there are other circumstances, such as those obtaining here, where intervention should be permitted in aid of the effective enforcement of the antitrust laws. But, if this Court affirms the decision of the District Court or dismisses the appeal of Westinghouse, it would be announcing for the first time a general rule of law that under no circumstances should a third party be allowed to intervene over the objection of the Department of Justice.

Situations in which intervention may be properly denied on the basis of the Department's objection are illustrated

by the cases cited by appellees, none of which is applicable to the case at bar. The Department may rightly object to private individuals attempting to intervene to have a voice in framing a judgment or to modify a judgment previously entered, and, in such cases, its objection might properly be controlling.* Similarly, where the Department has presented the available facts as to enforcement of a judgment to the court, it may object on the basis of orderly procedure to a third party doing the same thing.** But where a third party is seeking an opportunity to persuade a court to enforce a judgment entered into by the United States to protect the public interest and the private interest of persons in the position of the intervenor, the court should hear the intervenor in order to determine if its judgment is being enforced, *cf. System Federation No. 91* v. *Reid*, 180 F. 2d 991, 998 (6th Cir. 1950), and this Court indicated in *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, that it would be an abuse of discretion not to allow intervention where the Government does not present facts to the court.

This is a case in which the Department's position should not have controlled and intervention should have been permitted. At the very least, the Court should have exercised its discretion (as the Government suggested) to determine whether Westinghouse's theories warranted intervention. Westinghouse, as an independent station owner, was a person whom the decree was designed to protect. In fact, it was the deal that deprived Westinghouse of its

*See *United States* v. *Bearing Distributors Co.*, 18 F. R. D. 228, 231 (W. D. Mo. 1955); *United States* v. *General Electric Co.*, 95 F. Supp. 165 (D. N. J. 1950); *United States* v. *Bendix Home Appliances, Inc.*, 10 F. R. D. 73 (S. D. N. Y. 1949); *United States* v. *American Society of Composers, Authors and Publishers*, 11 F. R. D. 511 (S. D. N. Y. 1951).

**See *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137; *Wometco Television & Theatre Co.* v. *United States*, 355 U. S. 40; *United States* v. *Loew's Inc.*, 136 F. Supp. 13 (S. D. N. Y. 1955).

Philadelphia station that caused the Department to bring the action.

The Department of Justice, in opposing intervention (R. 43-4), did not suggest that intervention would obstruct the orderly administration of justice. Indeed, it suggested that "the court might find it helpful, [in] considering whether its judgment has been transgressed, to hear the views of the would-be intervenors." (R. 44) Contrary to RCA's contention (RCA 12), no facts were presented to the Court by appellees. The only "fact" to which RCA refers as having been presented to the Court is a copy of a letter dated May 26, 1960, from the Acting Assistant Attorney General, Antitrust Division, to Representative Celler (Appendix A to RCA motion). But that letter is a statement of conclusions, not evidence of facts. Furthermore, the soundness of those conclusions is open to serious doubt. For example, Mr. Bicks stated that the Antitrust Division had given "extensive consideration to the possibility that the instant transactions constituted the final stage of the RCA-NBC conspiracy alleged in the complaint." (RCA 20) He went on to state that

> "In light of the presumption that the conspiracy had ended with the entry of the Final Judgment, we thought it highly unlikely that the court would find this initial conspiracy between NBC and RCA to have been resurrected or to have survived, solely on the ground that one end sought by the conspirators had been achieved with the acquisition by NBC of stations in Boston and San Francisco."

There is no indication, apart from that unsupported statement of a presumption, why the Department of Justice concluded that it was "highly unlikely" that the District Court would find that the conspiracy continued. The Department of Justice concedes that consummation of the proposed transactions will result in RCA's and NBC's

achieving the very result which the Department of Justice alleged was unlawful. Someone should be allowed to present the facts to the Court. It is not enough for the Department to believe it "unlikely" that the Court will find its judgment violated.

(b) Question of whether Court had jurisdiction to permit intervention

Even the Department of Justice has considerable difficulty in supporting the main basis for Judge Kirkpatrick's decision, *i.e.*, that the court no longer had jurisdiction to permit intervention pursuant to the Federal Rules of Civil Procedure. The Department's position on that question is limited to a footnote on page 8 of its Brief wherein its support is limited to the following statement: "We know of no court decision in conflict with this [the lower court's] view." Indeed, that basis of the Court's decision is directly contrary to the position taken by the Department before Judge Kirkpatrick on May 6, 1960, and in its memorandum in opposition to Westinghouse's motion. (R. 43-4) After reciting the provisions of Section VIII of the Judgment, the Department stated to the Court on May 6:

> ". . . jurisdiction has not been exhausted and . . . the government not only would not oppose hearing anyone who wishes to be heard on this subject, but would urge you to exercise your discretion, to hear them if there should be any." (R. 39)

In its Memorandum dated June 3, 1960, the Department assumed the District Court retained jurisdiction and urged the court to hear Westinghouse for the limited purpose of determining "whether their proffer of proof and theories" warranted a determination under the Judgment.

The inclusion of the "and no one else" language in the Final Judgment was not intended to strip the District Court

of its jurisdiction; it was not intended to restrict the right of persons to intervene under Rule 24(a) or the power of the Court to permit intervention as a matter of discretion under Rule 24(b). Its purpose was to make clear that no third party was given an additional right to intervene under the terms of the Final Judgment such as was involved in *Missouri-Kansas Pipeline Co.* v. *United States*, 312 U. S. 502.

(c) Question of Westinghouse's right to intervene under Rule 24(a)(3)

Finally, on the question of Westinghouse's right to intervene under Rule 24(a)(3) it is difficult to understand how appellees can now allege that Westinghouse will not be adversely affected by the proposed disposition of the Philadelphia station in light of the certain termination that will result of Westinghouse's NBC affiliation in Boston. Westinghouse's motion for leave to intervene alleged that irreparable damage would result from loss of NBC affiliation (R. 27-8), and appellees did not controvert that pleading. The Department has conceded that "loss of NBC affiliation by Westinghouse . . . may result in economic injury to . . . [its] broadcasting operations in Boston" (RCA 20). The Department's action against NBC and RCA was predicated upon the importance of NBC affiliation to independent station owners such as Westinghouse and the use of the power to deprive such a station owner of that affiliation as a means of carrying out the illegal conspiracy. The Final Judgment enjoined the use of the power to terminate NBC network affiliation to coerce independent station owners to transfer an ownership interest in a broadcasting station.

Since the proposed disposal of the Philadelphia station will clearly adversely affect Westinghouse and since the

disposition of that station is subject to the control of the court, *Sutphen Estates, Inc.* v. *United States*, 342 U. S. 19, 22, intervention as of right under Rule 24(a)(3) was available to Westinghouse.

CONCLUSION

For the reasons stated above, the motions to dismiss or affirm should be denied and either probable jurisdiction should be noted or the question of jurisdiction should be postponed until a full hearing and determination of the merits.

Respectfully submitted,

GEORGE B. TURNER
15 Broad Street
New York 5, N. Y.

PHILIP H. STRUBING
123 South Broad Street
Philadelphia 9, Pennsylvania
Attorneys for Appellant

CRAVATH, SWAINE & MOORE
PEPPER, HAMILTON & SCHEETZ
ROBERT ROSENMAN
Of Counsel.